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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction
Permit for a New FM Station,
Channel 280A, Westerville,
Ohio

)
)
) MM Docket No. 93-107

)
) File Nos. BPH-911230MA

)
) through

)
) BPH-911231MB
)

To: The Review Board

MOTION FOR LEAVE TO FILE
COMMENTS

Respectfully submitted,

OHIO RADIO ASSOCIATES, INC.

By: _____

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February 13, 1995

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MOTION FOR LEAVE TO FILE COMMENTS

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.41 of the Commission's Rules, hereby submits this motion for leave to file comments. ORA requests leave to file comments in order to bring to the attention of the Review Board a recent Commission decision in The Livingston Radio Company, FCC 94-320, rel. January 12, 1995. That decision is material to issues raised in this proceeding. In support of its motion for leave to file comments, ORA submits the following.

Statement of the Facts

ORA proposes a fully-spaced tower site with 6 kw. effective power. Three of the applicants in this proceeding, Shellee F. Davis ("Davis"), David A. Ringer ("Ringer"), and ASF Broadcasting Corp. ("ASF"), filed amendments to their applications to propose a new tower site. Their proposed site is short-spaced to Station WTTF, Tiffin, Ohio, and to Station WPAY, Portsmouth, Ohio.

On May 18, July 19, and August 24, 1994, ORA filed oppositions to these amendments. On September 23, 1994, Radio Stations WPAY/WPFB, Inc. ("WPAY"), the licensee of WPAY, filed a petition to intervene in this proceeding because of the proposed short-spacings. On August 30, and September 23, 1994, WPAY filed oppositions to the Davis, Ringer, and ASF amendments.

Arguments

The Commission's decision in Livingston addresses the issue of short-spacing and imposes a stringent standard on applicants proposing short-spaced tower sites, even if not in a comparative hearing. Specifically, the Commission held that a "grandfathered" Class A station proposing to increase power above 3 kw., must comply with either Section 73.213

(c)(2) or Section 73.215. Id., para. 5.

Davis, Ringer, and ASF are considering themselves to be a "grandfathered" Class A station based on their filing for the facilities of a deleted 3 kw. facility. In their applications and the amendments thereto, they are proposing to increase power above 3 kw., but to no more than 6 kw.

Davis, Ringer, and ASF invoke Section 73.213 (c)(1), with respect to Station WTTF, in their attempt to increase power above 3 kw. However, as held in Livingston, Section 73.213 (c)(2) must be utilized. That provision requires the consent of the affected station.

Davis, Ringer, and ASF are therefore required to obtain the consent of Station WTTF in order to have their amendments accepted. However, this has not been done. As held in Livingston, para. 5, without the consent of the affected station, a power increase above 3 kw. is prohibited.

The applicant in Livingston did not attempt to invoke Section 73.215 to justify its proposed short-spacing. Thus, that decision did not address the requirements of Section 73.215. However, in MM Docket No. 87-121, 6 FCC Rcd 5356, 5360, para. 27 (1991), the Commission explicitly ruled that directional antennas could not be utilized to justify a short-space tower site where a fully-spaced tower site is available and suitable. As previously noted, ORA proposes the use of a fully-spaced tower site which is suitable and which would operate at an effective 6 kw. Accordingly, Davis, Ringer, and ASF can not utilize Section 73.215 to justify their short-spacing to Station WPAY.

Moreover, Commission policy proscribes an applicant in a comparative hearing from proposing a short-spaced tower site if a fully-spaced tower site is available and suitable.

North Texas Media, Inc. v. FCC, 778 F.2d 28, 34 (D.C. Cir. 1985). In Livingston, para. 11, the Commission generally cited to North Texas with approval, thus indicating its continuing vitality as precedent.


Conclusions

"Good cause" is demonstrated for acceptance of these comments. See, Section 1.229 (c). It informs the Board of a recent Commission decision which is a matter of probable decisional significance to issues raised in this proceeding and thus is of substantial public interest importance.

WHEREFORE, in view of the foregoing, ORA requests that the Review Board grant its motion for leave to file comments.

Respectfully submitted,

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February 13, 1995

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

THE LIVINGSTON
RADIO COMPANY

File Nos. BPH-891220IA
BPH-920325IE

For Construction Permit
to Modify the Facilities of
Station WHMI-FM, Howell, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1994; Released: January 12, 1995

By the Commission:

1. The Commission has before it the December 10, 1990 petition for reconsideration filed by The Livingston Radio Company ("Livingston") requesting reexamination of the Mass Media Bureaus' ("Bureau") October 30, 1990 dismissal of its application (file no. BPH-891220IA) to modify the licensed facilities of Station WHMI-FM, Howell, Michigan.¹ In addition, this decision addresses Livingston's subsequent minor change application (BPH-920325IE), filed March 25, 1992.²

2. By way of background, WHMI-FM is licensed to operate on Channel 228A with an effective radiated power (ERP) of 3.0 kW and an antenna height above average terrain (HAAT) of 91.0 meters. The station is currently short-spaced to second-adjacent channel Class B station WLTJ-FM, Detroit, Michigan and third-adjacent channel Class B station WIBM-FM, Jackson, Michigan.³ On December 20, 1989 Livingston filed minor change application BPH-891220IA to increase its ERP to 6.0 kW and its HAAT to 96 meters at its present site. Livingston asserted in the application that, pursuant to 47 C.F.R. § 73.207, it was permitted to modify its facility from the presently licensed parameters up to the maximum permitted for a Class A station (6.0 kW ERP/100 meters HAAT), provided that the proposed increase did not exacerbate the existing short-spacings to WLTJ and WIBM. These existing short-spacings, states Livingston, were created as a result of an

increase in the Class A spacing requirements adopted by the *Report and Order* in Docket 80-90, 94 FCC 2d 152, 48 Fed. Reg. 29496 (1983). Because the *Second Report and Order* in Docket 88-375, 4 FCC Rcd 6375 (1989), which adopted the higher 6.0 kW power limit for Class A stations, did not increase the spacing requirements between Class A and second- and third-adjacent channel Class B stations, WHMI-FM concludes that it is permitted to increase to maximum Class A facilities at its present site.

3. The Bureau's October 30, 1990 dismissal letter responded by stating that the increase in spacing requirements in the *Report and Order* in Docket 80-90 was adopted when the maximum parameters for Class A stations were limited to 3.0 kW ERP/100 meters HAAT. Further, the Bureau indicated that the *Second Report and Order* in Docket 88-375 did not contemplate any power increases for stations not meeting the spacing requirements prior to the October 2, 1989 effective date of the revised Class A spacing requirements; because WHMI-FM was not fully spaced under the "old" (pre-October 2, 1989) spacing rules, it was limited to maximum facilities of 3.0 kW ERP/100 meters HAAT. Since the application proposed facilities in excess of that limit, it was dismissed as unacceptable for filing.

4. In its petition for reconsideration, Livingston continues to maintain that the application was in compliance with 47 C.F.R. § 73.207, since no change in the existing short-spacings was proposed.⁴ Livingston also contends that neither the fact that provisions of BC Docket 80-90 were adopted when the maximum Class A ERP was 3 kW nor the fact that the *Second Report and Order* contained no explicit provision for power increases for short-spaced Class A stations "provide any guidance whatsoever" regarding whether such stations which became short-spaced under BC Docket 80-90 were barred from 6.0 kW/100 meter HAAT operation. Rather, states Livingston, "had the Commission determined to bar 6 kW power increases to Class A stations that became short-spaced by virtue of BC Docket 80-90, it had ample opportunity to so state." Petition at 6. Livingston also holds that the staff's dismissal was contrary to the action approved by the Commission in *Beasley Radio Company*, 4 FCC Rcd 6344 (1989), and the staff's interpretations given by Bureau staff members in a discussion concerning the 6.0 kW power increases with the Association of Federal Communications Consulting Engineers ("AFCCE") in December of 1989.⁵ Therefore, Livingston believes that reinstatement and grant of application BPH-891220IA are warranted.

¹ In view of the issues presented in the petition, the matter has been referred by the Bureau to the Commission pursuant to 47 C.F.R. § 1.106(a)(1).

² Pursuant to 47 C.F.R. § 73.3519(b), this latter proposal may not be considered until after WHMI-FM's petition for reconsideration has been addressed. By letter dated June 1, 1992, WHMI-FM requested dismissal of the petition for reconsideration if modification application BPH-920325IE is also granted. For the reasons set forth below, we will address *seriatim* both the petition for reconsideration and the March 25, 1992 modification application.

³ 47 C.F.R. § 73.207 requires WHMI to be spaced at least 69 km from WLTJ and WIBM-FM, whereas the actual spacings are 64.3 km and 66.9 km, respectively.

⁴ WHMI-FM cites 73.207(a), which states in pertinent part:

applications to modify the facilities of stations with short-spaced antenna locations authorized pursuant to prior waivers of the distance separation requirements may be accepted, provided that such applications propose to maintain or improve that particular spacing deficiency.

⁵ Livingston states that AFCCE members were told at that meeting that stations "short-spaced under the pre-October 2, 1989 rules for any reason other than the fact that they were authorized prior to 1964, 'have the right to go to full power for [their] class and all the rights associated with [their] class.'" Petition, at 12.

5. We disagree. With respect to Livingston's argument concerning the lack of a specific statement addressing the power and height maxima of stations with short-spacings created by Docket 80-90, we note that at the time Livingston's original application (and later the petition for reconsideration) was filed, the *Second Report and Order* in Docket 88-375 was still subject to petitions for reconsideration and clarification. In disposing of those petitions, the Commission expressly addressed the issue raised by Livingston in its application. We held that those stations with short-spacings created on or after November 16, 1964 (excluding short-spacings created after October 1, 1989) are governed by the provisions of 47 C.F.R. § 73.213 (c). *Memorandum Opinion and Order* in Docket 88-375, 6 FCC Rcd 3417, 3422 (1991). Under this section, WHMI-FM is permitted to increase to 6 kW ERP/100 meters HAAT provided that it submitted exhibits demonstrating the consent of the short-spaced stations to a grant and the increase is consistent with the public interest. The exhibit must consist of a letter (or other suitable document) from the affected parties acknowledging the proposed modification and indicating that it is not objectionable. *Memorandum Opinion and Order*, 6 FCC Rcd at 3419. Since no such exhibits have been provided, WHMI-FM may not modify its facilities to operate above the 3 kW ERP/100 meters HAAT standard. Contrary to Livingston's statements, 47 C.F.R. § 73.207(a) simply states that applications to modify the facilities of stations with existing short-spacings may be accepted, without reference to the maximum parameters permitted for such a station. Since it deals with spacing only, acceptance under the provisions 47 C.F.R. § 73.207 does not excuse noncompliance with the Commission's other technical provisions, including the limitations on power and antenna height.⁶ No other rule permits short-spaced Class A stations not in compliance with either 47 C.F.R. § 73.213(c)(2) (requiring consent of the affected stations) or 47 C.F.R. § 73.215 (the Commission's contour protection standards) to increase to maximum Class A facilities of 6.0 kW ERP/100 meters HAAT.

6. Moreover, we find that *Beasley Radio Company* is inapposite to the case at hand. That decision involved a Class B station attempting to increase to maximum facilities in keeping with then 47 C.F.R. § 73.211, which at the time permitted a short-spaced station to increase to the maximum power and height permitted for its class. In contrast, the present case involves a situation in which the specific maximum power limit of 47 C.F.R. § 73.211 for class A stations, as well as the general requirements for increasing facilities by short-spaced stations, have been dramatically changed by MM Docket 88-375. Finally, with respect to the staff's discussion with AFCCE about the 6 kW rules, we note that "it is the obligation of the interested parties to ascertain facts from official Commission records and files and not rely on statements or informal opinions by the staff." See *Texas Media Group, Inc.*, 5 FCC Rcd 2581, 2582 (1990), *appeal denied sub nom. Malkan FM Associates v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991).⁷

Accordingly, we find that the Bureau's October 30, 1990 dismissal of application BPH-8912201A was proper. The petition for reconsideration therefore will be denied below.

7. We now consider Livingston's subsequent minor change application, file no. BPH-920325IE. That application also proposes operation from the present transmitter site with maximum Class A facilities of 5.0 kW ERP/110 meters HAAT. An informal objection to the application was filed on April 30, 1992 by Viacom International, Inc. ("Viacom"), licensee of WLTJ, Detroit, MI.

8. In this proposal, Livingston notes that no objection was ever filed against the earlier application by either WLTJ or WIBM. Livingston also reports that its counsel held telephone conversations with counsel for WLTJ and WIBM in which those stations indicated that they preferred not to sign an agreement permitting WHMI-FM to increase its facilities. The present application also claims that a "critical need" exists for the power increase to overcome "considerable interference" from existing superpowered stations. Livingston states the WHMI(AM) and WHMI(FM) are the only stations licensed to Livingston County, with WHMI(AM) being forced to leave the air at night in order not to interfere with other AM stations. Further, WHMI-FM's signal allegedly is "unreliable" in the southeastern portion of Livingston County, home to half of the county's population. Two letters from police forces serving the county are provided in support of WHMI-FM's effort to improve its signal. Livingston also states that WHMI-FM is a primary source for information when tornados or severe storms threaten.

9. Viacom states in its informal objection that Livingston has erroneously implied that, by not filing an informal objection to application BPH-8912201A, it has acquiesced to Livingston's proposal. Viacom also argues that "public safety concerns cannot be properly transformed into means by which to circumvent Commission rules [such as 47 C.F.R. § 73.213(c)] that protect stations such as WLTJ" from increased interference, as 47 C.F.R. § 73.213(c) is designed to do. Informal objection, at 3. Viacom further urges the Commission not to waive the requirement that written consent be submitted to demonstrate compliance with 47 C.F.R. § 73.213(c)(2), and requests dismissal of the application. In response to Viacom's informal objection, Livingston calls the increase in interference within WLTJ's 54 dBu protected service area *de minimis*, by its calculation an increase of from 0.7 square miles to 2.0 square miles.

10. We have concluded, based upon our review of this matter, that Livingston's application should not be granted. This application, which does not propose to change transmitter site, is therefore subject to the same spacing requirements as Livingston's original proposal. The purpose of 47 C.F.R. § 73.213(c) is to prevent increased interference from existing short-spaced FM stations. This application would increase the existing interference areas to WLTJ and WIBM-FM, which is contrary to the stated intent of the Commission in MM Docket No 88-375. See e.g., *Second Report and Order*, 4 FCC Rcd at 6381. As noted by Viacom, Livingston has not secured the consent of WLTJ to

⁶ The *Second Report and Order* indicated that all stations becoming short-spaced pursuant to BC Docket 80-90 are governed solely by newly promulgated Section 73.213(c). Class A stations broadcasting with no more than 3 kW ERP/100 meters HAAT were permitted, under that section, "to modify or relocate ... newly grandfathered Class A stations that do not increase power

above the current limit" 4 FCC Rcd at 6381. Section 73.207 merely states that applicants may modify their short-spaced stations so long as no spacing deficiency is exacerbated.

⁷ Moreover, the portion of the discussion with the AFCCE provided in the petition for reconsideration did not address with any particularity a specific situation.

permit a unilateral increase by WHMI-FM, nor apparently does it have the consent of WIBM-FM. By Livingston's own statement, the licensees of these two stations were unwilling to give such consent. Written consent is an essential predicate under Section 73.213(c)(2) to grant of Livingston's application. Moreover, the lack of an opposition before the Commission from either of these parties cannot be construed as assent.

11. With respect to Livingston's statement that the increased facilities are necessary to overcome interference from "superpowered stations," we note that no such station exists.⁸ Short-spaced station WLTI and WIBM-FM operate within the power/antenna height limits of 47 C.F.R. § 73.211. Two additional short-spaced Canadian stations—CKLW-FM, Windsor, Ontario and CBCL-FM, London, Ontario—operate within the framework of the treaty between the U.S. and Canada governing FM operations in the border zone and do not cause objectionable interference to WHMI-FM. WHMI-FM's licensed facility continues to be afforded the same protection from interference to which the station is entitled under the Commission's rules. With respect to the severe weather and public service considerations raised by Livingston, we note that WHMI-FM is not an only local service, as it attempts to show, nor is it the only station capable of providing emergency and public service information to Livingston County.⁹ We believe that waiving our core technical rules standards on the basis of non-technical considerations (e.g., local service, public service reasons) would tend to undermine the FM allocations system as a whole and will not be undertaken absent truly compelling circumstances. Such circumstances do not exist in this case. See *North Texas Media, Inc. v. FCC*, FCC 84-456, *aff'd*, 59 RR 2d 605 (D.C. Cir. 1985); *ICBC Corp. v. FCC*, 716 F.2d 926 (D.C. Cir. 1983).

12. In light of the foregoing, the petition for reconsideration filed by Livingston against the dismissal of application BPH-891220IA IS DENIED. In addition, the informal objection by Viacom International Inc. against application BPH-920325IE IS GRANTED to the extent indicated, and application BPH-920325IE IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

⁸ We also note that, according to the staff's evaluation, no objectionable interference occurs within WHMI-FM's protected 60 dBu contour.

⁹ Pursuant to longstanding practice, AM and FM stations are considered to be joint components of a single aural medium. *Memorandum Opinion and Order*, Docket 88-526, 5 FCC Rcd 7094, 7097 (1990); *FM Channel Policies/Procedures*, 90 FCC 2d 88, 92 (1982). WHMI-FM, although the sole FM station licensed

within Livingston County, cannot be considered the only local aural service due to the presence of WHMI. Additionally, Howell lies within the principal community contour of stations WHFB-FM, Benton Harbor, Michigan, and WAUS(FM), Berrien Springs, Michigan, as well as AM stations WJR, Detroit, and WTKA, Ann Arbor (daytime only). The number of receivable signal serving the Howell area will, of course, be significantly larger.

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney, do hereby certify that on this 13th day of February, 1995, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Motion for Leave to File Comments" to the following:

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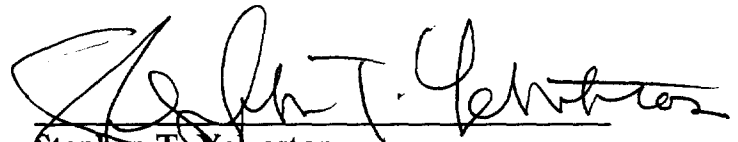
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